No. 07-83 MAY 19 2007

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In The

Supreme Court of the United States

JOSEPH J. SMITH,

Petitioner,

v.

ALAN AND SHARON WESTON, JEROME J. MANNING & CO. AND JEROME J. MANNING,

Respondents.

On Petition For Writ Of Certiorari To The New Hampshire Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

QUESTION 1

Did the Defendants, Jerome J. Manning & Co. and Jerome J. Manning, by conduct of the real estate auction of the Petitioner's house, violate Sherman Antitrust Act, Title 15 U.S.C. § 1 *et seq.*?

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OPINION BELOW

The opinion of the Supreme Court of New Hampshire is unreported and is reprinted in the appendix attached hereto at App. 1.

JURISDICTIONAL STATEMENT

This Honorable Court has jurisdiction to hear the within Petition for Writ of Certiorari to the New Hampshire Supreme Court pursuant to 28 U.S.C. § 1257 by a final judgment entered by the New Hampshire Supreme Court on February 20, 2007 which Order was entered less than 90 days ago.

TEXT OF PERTINENT STATUTE

SHERMAN ANTITRUST ACT

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 *et seq.*

STATEMENT OF THE CASE

Procedural History

On July 17, 2003 Alan Weston and Sharon Weston filed a Petition for Specific Performance and Damages in the Rockingham County Superior Court in the State of New Hampshire against Joseph J. Smith.

On October 1, 2003 the Petitioner, Joseph J. Smith, filed his Answer, Affirmative Defenses, and Counterclaim to Petition for Specific Performance and Damages against Alan Weston and Sharon Weston and a Third Party Complaint against Jerome J. Manning & Co. and Jerome J. Manning individually.

A trial (Morril P.J.) was held on April 11, 12, and 13, 2005.

The Judge found in favor of the Petitioners and denied the Respondent's Counterclaim and Third Party Complaint.

A timely Notice of Appeal was filed on June 22, 2005.

After briefing the New Hampshire Supreme Court issued an Order on December 28, 2006.

Petitioner filed a Motion to Enlarge Time to file Motion for Reconsideration which was granted and the Supreme Court denied Appellant's Motion for Reconsideration on February 20, 2007.

STATEMENT OF FACTS

On March 10, 2003 appellant ("Smith") contacted Massachusetts based Jerome J. Manning & Company Inc.,

d/b/a JJManning.com Auctioneers ("Manning & Co.") to discuss hiring Manning & Co. as an auctioneer for his residence. Manning & Co. prepared a specialized marketing proposal detailing the auction process, expenses and costs associated with conducting the auction. Smith prepaid all expenses and cost.

On March 19, 2003, Smith and Manning & Co. executed a principal contract – the Reserve Auction Listing Agreement. The contract was to perform the single task of selling Smith's residence at public auction. Manning & Co. was hired as a special agent.

The Reserve Auction Listing Agreement was modified to alter the minimum acceptable bid to Eight Hundred Thousand Dollars ($800,000) at the meeting on March 19, 2003 between Smith and Manning. Jerome Manning requested the lower minimum.

The Reserve Auction Listing Agreement does not contain the word "negotiate" or a clause to this effect.

On March 19, 2003 Smith executed a conditional contract conferring upon Jerome Manning a Limited Power of Attorney, "to execute any and all documents necessary to accomplish the sale of said property at Public Auction to be held on June 7, 2003 and to execute in my name and on my behalf any and all documents necessary to effect said sale including, but not limited to, the execution of a Purchase and Sale Agreement in furtherance of said Auction Sale."

The public auction of appellant's residence was conducted on June 7, 2003. The auctioneer announced from the auction podium "Sold. $770,000. That's, remember

at's subject to the confirmation of the owner. I'm not so sure that's going to happen."

Sharon Weston and Alan Weston (collectively "Westons'") made the final bid of $770,000. The last bid at public auction was below the minimum reserve of $800,000.

Smith returned to his property after the public outcry auction. Smith did not sign the purchase and sale agreement ("P&S") for $770,000.

Smith rejected the results of the auction and announced the property was not for sale at least four times.

The auctioneer told the high bidder, "I hope he [Smith] takes it [the $770,000 bid]."

Mrs. Weston stated on the videotape, "he [Smith] gets to refuse . . . he has the right to refuse . . . "

The auctioneer admitted he is not a licensed real estate broker in the State of New Hampshire. The auctioneer admitted on videotape the he could do nothing, not unless he could get the bidders to exceed the minimum.

Jerome J. Manning stated "they are going to have to bid $800,000 or they are not going to be able to buy the house." He told Mrs. Weston, "my strong suggestion is that you do that right away so that he does not have an opportunity to change his mind or to do whatever."

Manning and the Westons' both admitted that the conversation was a private discussion among them. The discussion took place outside Smith's home after the public auction. As a result the Westons' changed their bid to $800,000.

Manning admitted he affected the price of the auction and stated that his instruction concerning what to bid, "eventually got them to give me a bid of $800,000."

The auctioneer and high bidder signed the P&S for $800,000.

There was no phone bidder contrary to what Manning & Co. repeatedly testified to for 22 months during discovery. Jerome Manning and Justin Manning filed deposition errata sheets on April 8, 2005 at 5:14pm changing the "phone bidder" to an "absentee bidder" in response to 21 questions answered during deposition.

Jerome Manning testified the company had a pre-signed P&S agreement with the absentee bidder. Manning & Co. produced no such P&S. Justin Manning, however, testified that there are no documents with the "absentee bidder."

ARGUMENT

This case is about the auctioneer fabricating false bids during the public auction and the subsequent collusive bidding between the auctioneer and the high bidder post-auction. The objective of the collusive scheme was to rig the final auction results to match the minimum reserve in order to defraud Smith of his home after the auction results were rejected and the property withdrawn from sale.

The Sherman Antitrust Act does not require that a restraint on trade has to include monetary payment as a condition of proof of the agreement. *Nash v. United States*, 229 U.S. 373 (1913).

The Sherman Antitrust Act applies equally to auctioneers and bidders. *United States v. Guthrie,* 814 F.Supp. 942, 944-46 (E.D. Wash. 1993), *aff'd,* 17 F.3d 397 (9th Cir. 1994), *cert. denied,* 513 U.S. 823 (1994).

When a per se violation of the Sherman Antritrust Act is charged "it [is] not necessary to find that the defendants acted with the purpose of achieving anticompetitive effects or with knowledge that such effects likely would result." *United States v. Brown*, 936 F.2d 1042, 1046 (9th Cir. 1991).

"[B]ecause of their pernicious effect on competition and lack of any redeeming virtue," bid rigging and other forms of price fixing have long been deemed per se illegal under the Sherman Antitrust Act. *Northern Pacific Ry. v. United States,* 356 U.S. 1, 5 (1958).

> While an agreement to exchange pricing information by itself is not illegal; an agreement to fix the price is. The per se rule is a substantial principle of law rather than a mere convenience for the courts ("any agreement for price-fixing, if found, [is] illegal as a matter of law"). *United States v. Trenton Potteries Co.*, 273 U.S. 392, 396-98 (1927).

Activities in the flow of interstate commerce "need have but minimal impact upon the commerce to 'affect' it, since by definition they are a very part of the stream." *United States v. Foley*, 598 F.2d 1323, 1329 (4th Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980).

The conduct of the Real Estate auction resulted ultimately in two bidders left competing against each other. Sharon Weston and a purported phone bidder. After back and forth between Weston and the phone bidder, the auctioneer's gavel fell in favor of the Westons, however, at

a price below the $800,000 reserve. Subsequently, in a private conversation, Jerome J. Manning, on behalf of Jerome J. Manning & Company, advised the Westons that they must bid $800,000 if they want to get the property. The Westons then bid $800,000, Jerome J. Manning signed the P&S over the Petitioner's objection, and the Westons subsequently filed a Petition for Specific Performance.

Throughout the process of the civil litigation Jerome J. Manning & Company adamantly maintained that there was a phone bidder. At the eleventh hour, however, indeed the day before trial, Justin Manning, son of Jerome J. Manning, contradicted his deposition testimony and stated that there was no phone bidder, merely an unknown, unidentified absentee bidder.

Such collusive manipulative bidding and price fixing by Jerome J. Manning and Jerome J. Manning & Company were clear violations of the Sherman Antitrust Act and should not be allowed.

CONCLUSION

For the foregoing reasons the Petitioner prays that this Honorable Court issue a Writ of Certiorari to the New Hampshire Supreme Court, or, in the alternative summarily vacate and remand the case to the New Hampshire Supreme Court.

DATED at Portsmouth, New Hampshire this 18th day of May, 2007.

Respectfully submitted,

RICHARD NOLAN FOLEY
Attorney for the Petitioner

No. _____

In The
Supreme Court of the United States

JOSEPH J. SMITH,

Petitioner,

v.

ALAN AND SHARON WESTON, JEROME J. MANNING & CO. AND JEROME J. MANNING,

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On Petition For Writ Of Certiorari To The New Hampshire Supreme Court

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THE STATE OF NEW HAMPSHIRE

SUPREME COURT

(Entered Jan. 3, 2007)

In Case No. 2005-0457, *Alan Weston & a. v. Joseph J. Smith; Joseph J. Smith v. Jerome J. Manning & Co. & a.; Jerome J. Manning & Co. v. Joseph J. Smith*, the court on December 29, 2006, issued the following order:

Having considered the briefs and the record submitted on appeal, we conclude that oral argument is unnecessary for the disposition of this appeal and affirm in part, reverse in part and remand the decision of the trial court.

Alan and Sharon Weston (the "Weston") sued Joseph J. Smith ("Smith") for specific performance of a purchase and sales agreement (the P&S") that was executed following an auction performed by Jerome J. Manning & Co. and Jerome J. Manning, individually ("Manning") pursuant to a limited power of attorney granted to Manning by Smith in conjunction with the parties' auction contract (the "reserve listing agreement" or the "agreement'), Smith counterclaimed for a declaratory judgment voiding the P&S and for damages based upon the Weston's' fraudulent conduct in their dealings with Manning. Smith also filed a third-party action against Manning both in its corporate and individual capacities, alleging breach of contract, negligence, breach of fiduciary duty, unfair and deceptive acts in violation of R.S.A. 358-A, and antitrust claims - under the Sherman Act, 15 U.S.C. §1, *et seq.* Manning brought a separate civil claim against Smith for the commission due under the auction agreement, which was consolidated with the equity proceeding. Following a three-day bench trial, the lower court (Morrill, J.) awarded

specific performance to the Westons and $80,000.00 in commission to Manning. Smith appealed and Manning cross-appealed seeking attorney's fees. Smith subsequently transferred the property by warranty deed to the Westons in December 2005 and those parties filed docket markings ending their portion of the appeal, which was granted by this court on February 2, 2006.

The facts in this case demonstrate that Manning had actual authority to conduct the auction and execute the P&S in the manner in which he did. In reviewing a contract, this court considers the situation of the parties at the time of the agreement, the object that was intended thereby and all of the provisions of the document, taken as a whole. *R. Zoppo Co. v. City of Dover,* 124 N.H. 666, 671 (1984). Absent ambiguity, the intent of the parties is determined from the plain meaning of the language used in the contract. *Robbins v. Salem Radiology,* 145 N.H. 415, 418 (2000). When interpreting a multiple document agreement, the court seeks to harmonize and give effect to the provisions of the various documents so that none will be rendered meaningless. *West v. Turchioe,* 144 N.H. 509, 515 (1999).

Here, the reserve listing agreement expressly contemplated that Manning could sell the property before, during or after the auction and that the price could be below, at, or above the minimum acceptable bid. When read in conjunction with the limited power of attorney, however, Manning was only authorized to execute sale documents on behalf of Smith in the event that the sale price at the auction was equal to, or greater than, the minimum bid, plus the ten percent buyer's premium. Thus, under the plain terms of both the reserve listing agreement and the limited power of attorney, Manning was authorized to

execute a P&S once he had succeeded in increasing the Westons' bid to $800,000.00.

Contrary to Smith's position that the auction and his obligations under the agreement ended once the open bidding concluded, the agreement contemplated that Manning had an exclusive right to sell the property and receive his commission, even if the sale occurred after the auction. Manning's disclosure of the minimum bid to the Westons after the public bidding ended was likewise proper and was made in order to enable him to perform the contract. Under New Hampshire law, Manning was compelled to inform the bidders that Smith had set a minimum price below which the property would not be sold. *See Towle v. Leavitt,* 23 N.H. 360 (1851). Therefore, once Manning completed his performance under the contract and secured a purchaser, Smith was liable for payment of the commission. Because Manning's performance complied with the terms of the contract, Smith's remaining claims need not be addressed.

On cross-appeal, Manning asserts that the trial court abused its discretion in failing to award him costs and attorney's fees as a result of Smith's default on the agreement, or that his entitlement to fees was a question of law involving the interpretation of a contract, and not a matter upon which the trial court could exercise discretion. This court applies an unsustainable exercise of discretion standard when reviewing the trial court's decision regarding the award of attorney's fees. To constitute an unsustainable exercise, which is reversible on appeal, the discretion must have been exercised for reasons clearly untenable or to an extent clearly unreasonable to the prejudice of the appealing party. If there is some support in the record for the trial court's determination, it must be

upheld. *Town of Nottingham v. Newman,* 147 N.H. 131, 136 (2001).

Attorney's fees may be authorized by statute, an agreement between the parties, or an established judicial exception to the general rule that precludes recovery of such fees. *Id.* at 137. Here, the parties' agreement expressly provided for the payment of attorney's fees in the event of a default by Smith. Although this language imposes mandatory obligations, the facts necessary to support the award must still be presented, *see N.H. Challenge v. Commissioner, N.H. Dep't of Educ.,* 142 N.H. 246, 250 (1997), and the trial court was in the best position for making such an assessment. *Maguire v. Merrimack Mut. Ins. Co.,* 133 N.H. 51, 55 (1990).

The trial court's decision to award Manning his commission was premised upon its finding that Smith had ratified the P&S between the Westons and Manning, on Smith's behalf. The court did not, however, find that Smith had breached or otherwise defaulted on the reserve listing agreement, with Manning so as to trigger its provisions for the award of attorney's fees. Manning asserts that Smith breached the agreement when he notified the Westons by letter dated July 16, 2003, of his intention not to proceed with the sale, and that the court erred in not awarding fees on that basis. Although Manning has represented in his brief that the property was ultimately transferred from Smith to the Weston; this appears to have occurred more than two years after the closing date established in the agreement, during which time most of this litigation and fees were generated. Insofar as the trial court specifically found that Smith repudiated the agreement by his letter of July 16, 2003, notwithstanding his subsequent conveyance which was not part of the trial record, this constituted an

act of default under the express terms of paragraph 17 of the agreement for which Manning is entitled to attorney's fees. Consequently, we reverse the trial court's finding that Smith did not default or breach the reserve listing agreement and remand this case for a determination of reasonable attorney's fees as compelled by that agreement.

Affirmed in part, reversed in part and remanded.

Broderick, C.J., and Dalianis, Duggan, Galway, and Hicks, JJ., concurred.

Eileen Fox,
Clerk

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

Alan & Sharon Weston

v.

Joseph J. Smith

v.

Jerome J. Manning & Co. & Jerome J. Manning

03-E-0420

Jerome J. Manning & Co

v.

Joseph S. Smith

03-C-0895

ORDER

Petitioners Alan and Sharon Weston (the "Westons") bring this action against Joseph J. Smith ("Smith") for specific performance of a purchase-and-sale agreement. Respondent and Third-party Plaintiff Smith counterclaims and brings claims against Jerome J. Manning & Co. and Jerome J. Manning ("Manning"), individually, arising from Manning's conduct at the auction proceeding. Jerome J. Manning & Co. brought a claim against Smith for its commission under the auction contract. A bench trial on the merits was held during the week of April 11, 2005. The court hereby ***AWARDS the Westons specific performance of the purchase-and-sale agreement in their action against Smith. AWARDS Jerome J. Manning & Co. $80,0000 commission under the auction contract, and DENIES Smith's claims against Jerome J. Manning & Co., Jerome J. Manning and the Westons.***

In March 2003, Smith, who was in need of cash to satisfy a prior judgment, entered into a reserved listing auction agreement with Jerome J. Manning & Co., Inc., a Massachusetts corporation, to auction his real estate located in New Castle, New Hampshire. The agreement provided for a minimum acceptable bid of $800,000. As part of the agreement, Smith signed a document granting Manning a limited power of attorney. Manning conducted a public auction on June 7, 2003 on the property, and Smith left the premises. The Westons were the high bidders during the open bidding with a bid of $770,000. Manning took the Westons aside and explained that $770,000 was below the reserve and told them they would need to raise their bid if they wished to purchase the property. They offered to "split the difference" with Smith. After the open bidding, Smith returned to the house and went inside, accompanied by friends and his attorney. He exchanged words with Manning to the effect that the house was not for sale. Manning went inside and conferred with Smith, who continued to assert that the auction was over and he did not wish to sell the property. Manning, however, continued negotiations with the Westons, and entered the house once again to present another offer to Smith, which Smith rejected. Heated words were exchanged between Manning and Smith's attorney. Manning went outside, and he and the Westons executed a purchase-and-sale agreement for $800,000 plus $80,000 for the auctioneer's commission. The closing was scheduled for July 22, 2003 as stipulated by the auction agreement.

Smith disputed the validity of the purchase-and-sale agreement, claiming that Manning's actions were contrary to his instructions on the day of the auction. Smith's counsel met with the Westons' counsel to discuss the

dispute over the result of the auction. On June 12, 2003, Smith's counsel sent a letter to the Westons' counsel stating that Smith "continue[d] to dispute the validity of the purchase-and-sale agreement," but, given the outstanding judgment against him, he had "no viable alternative" to the sale at that time. Smith, however, was able to obtain refinancing, and on July 15, 2003, his counsel informed the Westons that he would not proceed with the sale.

The Westons brought a claim in equity against Smith for specific enforcement of the disputed purchase-and-sale agreement. Smith counterclaimed against the Westons for a declaratory judgment voiding the purchase-and-sale agreement and for damages arising from allegedly fraudulent conduct in their dealings with the auctioneer. Smith filed a complaint against third-party defendants Jerome J. Manning & Co. and Manning individually for damages arising from breach of contract, negligence, breach of fiduciary duty, unfair and deceptive acts and practices as set out in RSA 358-A, and anti-trust violations under the Sherman Act. Jerome J. Manning & Co., Inc. brought a separate civil claim against Smith for its commission under the auction agreement; that suit was consolidated with the equity action described above.

Manning and the Westons argue that the purchase-and-sale agreement is enforceable against Smith because Smith had granted Manning a limited power of attorney and the sum agreed upon met the minimum acceptable bid under the reserve auction listing agreement. Smith, however, argues that the auction ended without the minimum bid having been met and, therefore, claims that Manning's actions in signing the purchase-and-sale agreement extended beyond his actual authority under the

limited power of attorney. The limited power of attorney allowed Manning "to act on [Smith's] behalf in connection with the sale of said real property at Public Auction and all related matters" and to do so "only in the specific case that the sale price at said auction sale is equal to or greater than the Minimum Bid plus 10% Buyer's Premium described in his contract."

Assuming *arguendo* that Manning did not have actual authority under the limited power of attorney to enter into the purchase-and-sale agreement on behalf of Smith, the agreement is nevertheless valid under the doctrine of ratification. In an agency relationship, a principal may bind himself by subsequently ratifying an unauthorized act of the agent done on the principal's behalf. *See* 12 WILLISTON ON CONTRACTS § 35.22 et seq. (4th ed., 1999). "In general, an agency relationship occurs only when one, as principal, gives authority to another to act as agent on the principal's behalf. Authority to act as an agent may be express or may be implied from actions and conduct." *Fleet Bank v. Chain Construction Corp.*, 138 N.H. 136, 140 (1993) (internal citation omitted). When he negotiated with the Westons following the open bidding, Manning had at least implied authority, if not actual authority under the limited power of attorney.

> If a contract is otherwise voidable, it may be ratified by the aggrieved party "intentionally accepting benefits under the contract, remaining silent or acquiescing in the contract for a long period of time after an opportunity exists to have it declared void, or acting upon the contract by alternatively acknowledging it or performing under it."

Keshishian v. CMC Radiologists, 142 N.H. 168, 173 (1997) (citation omitted). In this case, Smith's actions and communications with the Westons ratified the contract. The June 12, 2003 letter clearly stated that, while Smith challenged the validity of the purchase-and-sale agreement, he had "no viable alternative." These statements are not, in fact, contradictory, but, rather, consistent with the ratification argument. Smith could maintain his position that the purchase-and-sale agreement was invalid as entered into by Manning on his behalf, yet still subsequently go forward with the agreement, as the Westons were still willing to buy the property. Smith was under great pressure to obtain the money necessary to satisfy the prior judgment against him and his attempts to obtain financing had been unsuccessful. With that in mind, Smith acknowledged the contract and indicated his willingness to proceed under its terms. The fact that he did so grudgingly is no defense to ratification.

The New Hampshire Supreme Court has held that a party "cannot treat [a] contract as binding and as rescinded at the same time, and after he has elected to stand by the contract and receive the benefits it confers on him, and has thus ratified and confirmed it, he cannot thus rescind and repudiate it." *Willoughby v. Moulton,* 47 N.H. 205, 208 (1866). Smith acknowledged that he had no alternative but to proceed with the contract and received benefits from the contract – he used the scheduled closing in order to obtain the patience of his judgment creditor, avoiding a sheriff sale of the property or other consequences. Because Smith subsequently ratified the purchase-and-sale agreement, he was bound by its terms, and his letter of July 16, 2003 was a repudiation of a valid contract.

Smith claims that even if he did ratify the contract, his ratification was brought on by economic duress, and thus, the contract was unenforceable. In order for a party to prevail on a claim of economic duress:

> the coercive circumstances must have been the result of the acts of the opposite party. A contract signed because a party is bargaining under adverse conditions or in pressing want of pecuniary means is not unenforceable on account of duress if the other party is not responsible for those circumstances and did not create those necessities.

Chesire Oil Co. v. Springfield Realty Corp., 118 N.H. 232, 237 (1978). In this case, neither the Westons nor Manning had anything to do with the coercive circumstances. The pressure on Smith resulted from the prior judgment against him, unrelated to the Westons or Manning. Thus, there is no evidence of economic duress in this case. Accordingly, the Westons are entitled to specific performance of the purchase-and-sale agreement. As Smith ratified the purchase-and-sale agreement, Jerome J. Manning & Co. is entitled to its commission under the contract between Smith and Jerome J. Manning & Co., which amounts to $80,000.00.

Smith has presented no evidence of fraud or conspiracy involving Manning and the Weston. Nor has he introduced evidence of breach of fiduciary duty, unfair and deceptive acts and practices as set out in RSA 358-A, or anti-trust violations under the Sherman Act by Jerome J. Manning or Jerome J. Manning & Co. Accordingly, Smith's claims against Jerome J. Manning or Jerome J. Manning & Co and counterclaims against the Westons are ***DENIED***.

Parties' requests for attorneys' fees and costs are ***DENIED***.

So ***ORDERED***.

5-24-05
DATE

/s/ Robert E. K. Morrill
ROBERT E. K. MORRILL
Presiding Justice

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT
DOCKET NO. 03-E-0420

Alan Weston and Sharon Weston

v.

Joseph J. Smith

v.

Jerome J. Manning & Co., Inc. and Jerome J. Manning, Individually, Third Party Defendants

RESPONDENT'S THIRD PARTY COMPLAINT

Now comes the Respondent, Joseph J. Smith, by and through his attorney, John E. Lyons, Jr., who hereby files this Third Party Complaint against Jerome J. Manning Co. Inc. and Jerome J. Manning, Individually on the following grounds:

COUNT I.
A PLEA OF ASSUMPSIT

1. Respondent, Joseph J. Smith, and Third Party Defendant Jerome J. Manning & Co., Inc. entered into a Reserve Auction Listing Agreement dated March 19, 2003 in which Respondent hired the Third Party Defendant to auction his real property located at 188 Portsmouth Avenue, New Castle, New Hampshire for a minimum acceptable bid of $800,000.00 plus a ten percent (10%) premium which would total for a minimum auction bid of $880,000.00.

2. Public auction was held on June 7, 2003.

3. The Petitioners made the last and highest bid prior to closure of the public auction of $770,000.00 and therefore, no minimum acceptable bid was made at the public auction.

4. At or near the time of the Third Party Defendant's announcement that the public auction was closed, and bringing the gavel down to officially close the auction, he announced that the $770,000.00 bid was not a sufficient bid. However, no other bid was made prior to the closing of the public auction.

5. The Third Party Defendant then approached Respondent to inquire as to whether or not Respondent would agree to enter into negotiations with the Petitioners to sell his real property outside of public auction. Respondent indicated he was not interested in entering such negotiations.

6. The Third Party Defendant, then on its own accord and against the express instructions of Respondent not to do so, entered into negotiations with Petitioner and sell Respondent's property.

7. Third Party Defendant is not licensed to sell real estate in New Hampshire and is only licensed to act as an auctioneer.

8. In direct breach of the contract as set out above, the Third Party Defendant, Jerome J. Manning & Co., Inc. disclosed the amount of the minimum bid.

9. In direct breach of the contract and instructions given by Respondent, the Third Party Defendant, Jerome J. Manning & Co., Inc. continued to negotiate with the Petitioners ultimately entering into a void Purchase and Sales Agreement.

10. In that the Third Party Defendant's actions were intentional, and or willful, wanton and malicious; and as a direct, proximate and foreseeable result, Respondent has suffered damages and claims a right to reimbursement of attorney fees and costs, and all other damages arising from the breach of contract.

II. PLEA OF THE CASE

11. Respondent repeats and realleges each and every allegation contained in paragraphs one through ten.

12. Respondent further says that the Third Party Defendant Jerome J. Manning & Co., Inc. owed Respondent a duty to act reasonably as the real estate auctioneer of his property.

13. The Third Party Defendant did breach its said duty and following close of the public auction, disclosed the amount of the minimum bid and after being specifically instructed by the Respondent not to do so, continued to negotiate with the Petitioner and ultimately entered into a Purchase and Sale Agreement with Petitioner.

14. As a direct, proximate and foreseeable result of the actions of the Third Party Defendant, Jerome J. Manning & Co., Inc. as set out above, Respondent has suffered damages all of which are within the minimum and maximum jurisdictional limitations of this Honorable Court.

III. BREACH OF FIDUCIARY DUTY

15. Respondent repeats and realleges each and every allegation contained in paragraphs one through fourteen.

16. The Third Party Defendant Jerome J. Manning & Co., Inc. owed a fiduciary duty to the Respondent pursuant to the Reserve Auction Agreement.

17. Third Party Defendant Jerome J. Manning & Co., Inc. did breach its fiduciary duty to the Respondent and it disclosed the minimum acceptable bid and continued to negotiate with Petitioners after the close of the public auction and after being specifically instructed by Respondent not to do so.

18. As a direct, proximate and foreseeable result of the actions of the Third Party Defendant, Jerome J. Manning & Co., Inc. as set out above, Respondent has suffered damages all that are within the minimum and maximum jurisdictional limitations of this Honorable Court.

IV. PLEA OF ASSUMPSIT

19. Respondent repeats and realleges each and every allegation contained in paragraphs one through eighteen.

20. The Third Party Defendant Jerome J. Manning, Individually entered into a Limited Power of Attorney with the Respondent dated March 19, 2003 allowing Jerome J. Manning, Individually to execute any and all documents "necessary to accomplish the sale of said property at public auction."

21. No sale of Respondent's property occurred at public auction in that at the close of the public auction, the minimum acceptable bid had not been met.

22. Neither the Individual Third Party Defendant, Jerome J. Manning or Jerome J. Manning & Co., Inc. are

licensed to sell real estate in New Hampshire, and are only licensed to act as an auctioneer.

23. Third Party Defendant Jerome J. Manning, Individually then approached Respondent and asked if he could continue to negotiate with the Petitioners for sale of the property.

24. Respondent specifically advised Third Party Defendant Jerome J. Manning, Individually that he was not to negotiate with the Petitioners.

25. In breach of the Limited Power of Attorney and directly contrary to the instructions of Respondent, the Third Party Defendant, Jerome J. Manning, Individually then entered into a Purchase and Sales Agreement with Petitioners.

26. As a direct, proximate and foreseeable result of the actions of the Third Party Defendant Jerome J. Manning & Co., Inc. as set out above, Respondent has suffered damages all of which are within the minimum and maximum jurisdictional limitations of this Honorable Court.

27. The actions of the Third Party Defendant, Jerome J. Manning, Individually were intentional, willful, wanton and malicious and therefore, Respondent is entitled to attorney fees and costs.

V. IN A PLEA OF THE CASE

28. Respondent repeats and realleges each and every allegation contained in paragraphs one through twenty-seven.

29. Pursuant to the Limited Power of Attorney entered into by and between the Respondent and the

Third Party Defendant Jerome J. Manning, Individually, the Third Party Defendant had a duty to Respondent to act in conformity with the Limited Power of Attorney.

30. The Third Party Defendant Jerome J. Manning, Individually did breach his said duty and acted outside and contrary to the Limited Power of Attorney and contrary to Respondent's specific instructions as set out above.

31. As a direct, proximate and foreseeable result of the actions of the Third Party Defendant, Jerome J. Manning, Individually as set out above, Respondent has suffered damages all of which are within the minimum and maximum jurisdictional limitations of this Honorable Court.

VI. IN A PLEA OF BREACH OF FIDUCIARY DUTY

32. Respondent repeats and realleges each and every allegation contained in paragraphs one through thirty-one.

33. The Third Party Defendant, Jerome J. Manning, Individually owed Respondent a fiduciary duty pursuant to the Limited Power of Attorney as set out above.

34. The Third Party Defendant, Jerome J. Manning, Individually did breach his fiduciary duty to Respondent as set out above.

35. As a direct, proximate and foreseeable result of the actions of the Third Party Defendant, Jerome J. Manning, Individually as set out above, did breach his said fiduciary duty, Respondent has suffered damages all of which are within the minimum and maximum jurisdictional limitations of this Honorable Court.

VII. IN A PLEA OF BREACH OF RSA 358-A (ET SEQ.)

36. Respondent repeats and realleges each and every allegation contained in paragraphs one through thirty-five.

37. The Third Party Defendant, Jerome J. Manning, Individually and the Third Party Defendant Jerome J. Manning & Co., Inc. did engage in unfair and deceptive acts and practices in the conduct of trade and commerce as set out in RSA 358-A (et seq).

38. Respondent seeks all damages allowed as set out pursuant to RSA 358-A:10.

VII. IN A PLEA OF VIOLATION OF RSA 356 (ET SEQ.)

39. Respondent repeats and realleges each and every allegation contained in paragraphs one through thirty-eight.

40. The actions of the Third Party Defendant Jerome J. Manning Co. & Inc. [sic] and Jerome J. Manning, Individually conspired for purpose to effect and control the price of auction as set out above in violation of RSA 356 (et seq.).

41. Respondent seeks all damages as allowed by RSA 356:11 as a direct result of the breach as set out above.

VII. IN A PLEA OF VIOLATION OF THE SHERMAN ANTI-TRUST ACT

42. Respondent repeats and realleges each and every allegation contained in paragraphs one through forty-one.

43. The actions of the Third Party Defendants Jerome J. Manning & Co., Inc. and Jerome J. Manning,

Individually as set out above, constitute a violation of the Sherman Anti-Trust Act.

44. Respondent seeks all damages as allowed by The Sherman Anti-Trust Act as a direct result of the breach as set out above.

Dated: October 1, 2003

Respectfully Submitted,

JOSEPH J. SMITH

By His Attorneys,
LYONS LAW OFFICES, P.A.

By /s/ John E. Lyons, Jr.

John E. Lyons, Jr.
Orchard Park – Unit B-10
875 Greenland Road
Portsmouth, NH 03801
Telephone: (603) 431-5144

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT
DOCKET NO. 03-E-0420

Alan Weston and Sharon Weston

v.

Joseph J. Smith

RESPONDENT'S MOTION TO JOIN THIRD PARTY DEFENDANT AND FILE THIRD PARTY COMPLAINT

Now comes the Respondent, Joseph J. Smith, by and through his attorney, John E. Lyons, Jr., who hereby moves to join third party defendants Jerome J. Manning & Co., Inc., a Massachusetts corporation licensed to auction property in New Hampshire, with a principal place of business at 179 Old Kings Highway, Yarmouthport, Massachusetts 02675, and Jerome J. Manning, Individually also of 179 Old Kings Highway, Yarmouthport, Massachusetts 02675 on the following grounds and file the following attached third party complaint:

1. Petitioners have filed a Petition for Specific Performance and Damages against Respondent.

2. The basis of Petitioners' Petition for Specific Performance and Damages is that a "Public Auction" was held as to the sale of Respondent's property pursuant to a Reserved Auction Listing Agreement entered into between Respondent and Jerome J. Manning & Co., Inc.

3. The Reserve Auction Listing Agreement provides for a "minimum acceptable bid" of $800,000.00 plus a ten

percent (10%) premium for a total minimum acceptable bid of $880,000.00.

4. Petitioners admit in paragraph thirteen of their Petition for Specific Performance and Damages, that they made the last and highest bid at the close of the auction in the amount of $770,000.00.

5. The auctioneer then privately approached the Respondent to inquire as to whether or not he was willing to sell the property to the Petitioners. Respondent advised the auctioneer that he refused to sell the property since the minimum acceptable bid had not been offered prior to the close of the auction.

6. The auctioneer on his own accord, then entered into negotiations with the Petitioners as to sale of the property outside of the auction process. Petitioners admit in paragraph fifteen of their Petition for Specific Performance and Damages, the auctioneer actually disclosed the minimum acceptable bid of $800,000.00 plus a ten percent (10%) premium totaling $880,000.00. This disclosure was inappropriate and constituted a breach by Jerome J. Manning & Co., Inc of the contract and its fiduciary duty.

7. As part of the Reserve Auction Listing Agreement with Jerome J. Manning & Co., Inc., Respondent also entered into a Limited Power of Attorney with Jerome J. Manning, individually so Jerome J. Manning, individually, could execute all documents "in connection with the sale of said real property at Public Auction."

8. Although the Public Auction was closed without the minimum acceptable bid offered, Jerome J. Manning claiming authority under the Limited Power of Attorney, and after improperly disclosing the minimum bid following the close of the Public Auction, and after being instructed

by Respondent not to deal with the Petitioners, improperly entered into a Purchase and Sales Agreement with Petitioners.

9. Petitioners, relying on the actions of Jerome J. Manning & Co., Inc. and Jerome J. Manning, individually, brought suit claiming a right to title to the Respondent's property based on the Purchase and Sales Agreement as set out above.

WHEREFORE, Respondent prays as follows:

A. Jerome J. Manning & Co., Inc. be added as a proper third party Defendant and Orders of Notice be issued accordingly, incorporating the attached third party complaint marked as Exhibit A;

B. Jerome J. Manning, Individually be added as a proper third party Defendant and Orders of Notice be issued accordingly, incorporating the attached third party complaint marked as Exhibit A;

C. For such other and further relief as may be just and equitable.

Dated: 10/1/03

Respectfully Submitted,

JOSEPH J. SMITH

By His Attorneys,
LYONS LAW OFFICES, P.A.

By /s/ John E. Lyons, Jr.

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875 Greenland Road
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Telephone: (603) 431-5144

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

(Entered Feb. 22, 2007)

In Case No. 2005-0457, *Alan Weston & a.v. Joseph J. Smith; Joseph J. Smith v. Jerome J. Manning & Co. & a.; Jerome J. Manning & Co. v. Joseph J. Smith*, the court on February 20, 2007, issued the following order:

Appellant's motion to enlarge time to file motion for reconsideration is granted. Appellant's motion for reconsideration is denied.

Reconsideration denied.

Broderick, C.J., and Dalianis, Duggan, Galway, and Hicks, JJ., concurred.

Eileen Fox,
Clerk

Distribution:
Rockingham County Superior Court 03-E-420, 03-C-895
Honorable Robert E.K. Morrill
Richard Thorner, Esquire
Stephen Judge, Esquire
Richard N. Foley, Esquire
David A. Anderson, Esquire
File